Supreme Court, U.S.
FILED

03 611 OCT 22 2003

OFFICE OF THE CLERK

In the

Supreme Court of the United States

DAVID A. GOLDMEIER
and TERRY C. GOLDMEIER,

Petitioners,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Tony C. Merry
Counsel of Record
PALMER VOLKEMA THOMAS
140 East Town Street
Suite 1100
Columbus, Ohio 43215
(614) 221-4400
Attorneys for Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

55 pp

QUESTIONS PRESENTED

Does an employee have a cause of action against an employer for failure to accommodate a religious conflict under 28 U.S.C. § 2000e(j) in the absence of proof of an adverse job action?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 16

APPENDIX

CIRCUIT COURT ORDER (7/24/2003) 1a

DISTRICT COURT ORDER (7/16/2001) 17a

TABLE OF AUTHORITIES

CASES

ANSONIA BOARD OF EDUCATION v. PHILBROOK, 479 U.S. 60 (1986) 3, 8, 9, 11

BERGSTROM-EK v. BEST OIL CO., 153 F.3D 851, 858-859 (8TH CIR. 1998) 15

BOOMSMA v. GREYHOUND FOOD MGMT. INC., 639 F. SUPP. 1448, 1454 (W.D. MICH. 1986), APP. DISM. 815 F.2D 76 (6TH CIR. 1987) 8

BRENER v. DIAGNOSTIC CENTER HOSPITAL, 671 F.2D 141, 145-46 (5TH CIR. 1982) 9

BURNS v. SOUTHERN PACIFIC TRANSPORTATION CO., 589 F.2D 403, 405 (9TH CIR. 1978), CERT. DENIED, 439 U.S. 1072 (1979) 13, 15

COOPER v. OAK RUBBER CO., 15 F.3D 1375, 1378 (6TH CIR. 1994) 6

DEWEY v. REYNOLDS METALS COMPANY, 429 F.2D 325 (6TH CIR. 1970) AFF'D BY AN EQUALLY DIVIDED COURT, 402 U.S. 689 (1971) 10, 11

HARRINGTON v. VANDALIA-BUTLER BOARD OF EDUCATION, 585 F.2D 192 (6TH CIR. 1978), CERT. DENIED 441 U.S. 932 (1979) 12, 13, 14

HOLLINS v. ATLANTIC CO., 188 F.3D 652, 662 (1999) 5

KIMZEY V. WAL-MART STORES, INC., 107 F.3D 568, 574 (8TH CIR. 1997) 15

PHILBROOK V. ANSONIA BOARD OF EDUCATION, 757 F.2D 476, 482-83 (2D CIR. 1985), AFF'D, 479 U.S. 60 (1986) 7, 14

RODRIGUEZ V. CITY OF CHICAGO, 156 F.3D 771 (7TH CIR. 1998), CERT. DENIED, 525 U.S. 1144 (1999) 14

SMITH V. PYRO MINING CO., 827 F.2D 1081, 1085 (6TH CIR. 1987) 6

TOOLEY V. MARTIN-MARIETTA CORP., 648 F.2D 1239 (9TH CIR. 1981), CERT. DENIED, 454 U.S. 1098 (1981) 14

VIRTS V. CONSOL. FREIGHTWAYS CORP., 285 F.3D 508, 516 (6TH CIR.2002) 6

WRIGHT V. RUNYON, 2 F.3D 214, 216-217, N.4 (7TH CIR. 1993), CERT. DENIED, 510 U.S. 1121 (1994) 15

YOUNG V. SOUTHWESTERN SAVINGS AND LOAN ASS'N, 509 F.2D 140 (5TH CIR. 1975) 15

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

42 U.S.C. § 2000e(j) ..... i, 2, 6, 7, 11

42 U.S.C. § 2000e-2.....2

OTHER AUTHORITIES

HOUSE REPORT NO. 102-40(I), AT 2 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS (1991) 549, 602-03.....13

PETITION FOR A WRIT OF CERTIORARI

Petitioners David A. Goldmeier and Terry C. Goldmeier ("Goldmeiers") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, pp. 1a – 16a) is reported at 337 F.3d 629 (6th Cir. 2003). The opinion and order of the United States District Court for the Southern District of Ohio (App., *infra*, pp. 17a – 31a) is unpublished.

JURISDICTION

The district court had federal question jurisdiction over the plaintiffs' claims under Title VII of the Civil Rights Act of 1964 ("Title VII") pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on July 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII prohibits discrimination on grounds of race, color, sex, and national origin, as well as religion:

It shall be an unlawful employment practice for an employer –

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (a).

Cases alleging religious discrimination, however, are unique because Title VII's definition of "religion" is unique:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j).

STATEMENT OF THE CASE

This is an employment discrimination case brought under Title VII of the Civil Rights Act of 1964 and parallel Ohio law. The Goldmeiers allege that Defendant Allstate Insurance Company discriminated against them on the basis of their religion by requiring them to work on Friday evening after sundown and on Saturday morning, the Goldmeiers' Sabbath. The Goldmeiers allege that Allstate discriminated against them (1) by failing even to attempt to accommodate their religious needs and (2) by constructively discharging them for their failure to accept Allstate's work requirements.

The issue presented by this petition is identical to one of the issues originally before this Court in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986). The petitioner in that case raised two issues: whether he had established a *prima facie* case of religious discrimination even if "he had not been placed by the school board in a position of violating his religion or losing his job," and whether respondent employer was obligated to accept the accommodation proposed by the petitioner in the absence of undue hardship. 479 U.S. at 65-66. With respect to the first issue, however, the Court noted that the case had been resolved after trial, and not on summary judgment, and concluded that "whether the plaintiff really did [make out a *prima facie* case] is no longer relevant." *Id.* at 67. The Court therefore addressed only the question of "whether the employer's proposed accommodation of respondent's religious practices comports with the statutory mandate...." *Id.* at 68.

This case comes to the Court following summary judgment in favor of the employer. Relying upon circuit precedent, both the district court and the court of appeals concluded that petitioners could not establish a *prima facie* case because they had resigned after Allstate's refusal to accommodate them and, therefore, that they had not suffered an adverse job action. Because the decisions below fly in the face of the clear language of the statute imposing an affirmative obligation upon an employer to accommodate an employee's religion when it conflicted with a work rule, petitioners urge the Court to grant their petition.

I. Factual Background

The Goldmeiers, Sabbath observant Jews, joined the Allstate sales force in the 1980's and together built a family insurance business. They accommodated their Sabbath observance by closing their office before sundown on Friday evenings and by remaining closed all day Saturday and on other religious holidays. App., *infra*, pp. 2a – 3a.

In September 1998, Allstate announced new Service Availability Standards, to become effective January 1, 1999, that required the Goldmeiers either to work themselves until 6 p.m. on Fridays and on Saturdays, or to hire someone, at their own expense, to work for them. App., *infra*, p. 3a.

Immediately upon hearing of the new standards, and offering to work Sundays instead of Saturdays, the Goldmeiers asked their Allstate manager for a religious accommodation to the Sabbath work rules. After conferring with his superiors, the manager refused the

accommodation. App., *infra*, p. 18a. In October 1998, the Goldmeiers pursued a different chain of command, appealing to the human resources department for an accommodation to the Sabbath work rule. Three layers of human resources managers refused the accommodation. App., *infra*, pp. 19a – 20a. In November 1998, concluding that they had no alternative, the Goldmeiers resigned. App., *infra*, pp. 4a, 21a.

II. Proceedings in the District Court

Petitioners filed a complaint in the United States District Court for the Southern District of Ohio. App., *infra*, p. 17a. Petitioners alleged, *inter alia*, that Allstate had discriminated against them on account of their religion, in violation of Title VII, by failing to accommodate their Sabbath observance and by constructively discharging them.

The district court granted Allstate's motion for summary judgment. Relying upon *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (1999), a case in which the plaintiff asserted a retaliation claim rather than a failure to accommodate claim, the district court held that plaintiffs could not establish a *prima facie* case absent a showing "that they were subjected to a 'materially adverse change in the terms and conditions of [their] employment.'" App., *infra*, p. 25a. The district court also concluded that Allstate had no duty to accommodate because plaintiffs' claims that the proposed work rule conflicted with their religion was "speculative." App., *infra*, p. 27a.

III. Proceedings in the Court of Appeals

Petitioners appealed, and a panel of the Sixth Circuit affirmed. Relying on circuit precedent, the court of appeals held that the Goldmeiers had failed to establish a *prima facie* case of employment discrimination because they could not show that they had been disciplined or discharged for failing to comply with the Sabbath work requirement. App., *infra*, p. 5a, citing *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994), *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987), and *Virts v. Consol. Freightways Corp.*, 285 F.3d 508, 516 (6th Cir.2002).

Under Sixth Circuit precedent, the Goldmeiers were required to establish a genuine issue of fact on three issues in order to establish a *prima facie* case: (1) that they held a sincere religious belief that conflicts with an employment requirement; (2) that they informed Allstate of the conflict; and (3) that they were discharged or disciplined for failing to comply with the conflicting requirement. App. *infra*, p. 5a. The parties agreed that the Goldmeiers' religious belief barring Sabbath work was sincere and that the Goldmeiers had informed Allstate of the conflict. App. *infra*, pp. 5a – 6a. Contrary to the district court, however, the court of appeals also found that Allstate's Sabbath work rule imposed a burden on the Goldmeiers' religious observance. "[T]he Goldmeiers were faced with a choice of violating the Sabbath or hiring outside staff using either their own funds or their limited office expense allowance, otherwise available for other business-enhancing purposes to other agents. Such an incompatibility between an employment and a religious

requirement is sufficient to create a conflict." App. *infra*, p. 7a (footnote omitted).

The court of appeals found, however, that the third element of the *prima facie* case had not been satisfied. In so holding, the court of appeals refused to consider petitioners' assertion that the three-part formulation of the *prima facie* case was inapplicable in a case alleging failure to accommodate in violation of 42 U.S.C. § 2000e(j), stating simply, "We have consistently held that a prima facie case of religious discrimination requires discharge or discipline for failure to comply with an employment requirement conflicting with a religious requirement." App. *infra*, p. 7a. In this, the court's decision conflicts with decisions in other circuits, notably *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 482-83 (2d Cir. 1985), *aff'd*, 479 U.S. 60 (1986) ("While we acknowledge that some courts have stated that discharge was required to make a prima facie showing of discrimination, Title VII prohibits not only discrimination in hiring and firing but also discrimination 'with respect to compensation, terms, conditions or privileges.'").[1]

The court then found that the Goldmeiers could not establish that they had been constructively discharged because "Allstate did not expose the Goldmeiers to a work environment so hostile and

---

[1] In distinguishing *Philbrook*, the court of appeals incorrectly suggested that the parties in that case had assumed a *prima facie* case, citing this Court's refusal to rule on the existence of a *prima facie* case. App., *infra*, p. 12a. The Second Circuit Court of Appeals expressly rejected the "discipline or discharge" element. *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 482-83 (2d Cir. 1985), *aff'd*, 479 U.S. 60 (1986).

abusive as to compel a reasonable Orthodox Jewish couple to quit, rather than tolerate it for one more day." App. *infra*, p. 9a. The court conceded that Allstate's intransigence "could potentially have led to an actual discharge at some point in the future," App. *infra*, p. 10a, but it held that the Goldmeiers' resignation, fifty-three days before the work rules were actually imposed, was not legally justified. *Infra*, p. 10a.[2]

The court of appeals also rejected the Goldmeiers' argument that 1991 Civil Rights Act permitted a cause of action for damages for failure to accommodate, even in the absence of discipline or discharge. In this, the court undertook no evaluation of the statute or its effects, instead simply reiterating that the discipline or discharge element remained a part of the plaintiffs' *prima facie* case, adding, "Even were we so inclined, absent circumstances not present here, no panel of this court has the authority to overrule the previous, published decision of another panel." App., *infra*, p. 12a.

Finally, the court of appeals refused entirely to address the Goldmeiers' claim of failure to accommodate, relying upon Sixth Circuit precedent that the duty to accommodate does not arise until an

---

[2] The court of appeals suggested that Allstate's intransigence was ultimately tempered, but Allstate offered the Sunday accommodation only after the Goldmeiers had already resigned, notified their clients of their departure, and began working for new employers. The court did not cite any authority for the proposition that a post-resignation offer of accommodation was sufficient to cure the earlier failure to accommodate, and the case law is to the contrary. *Boomsma v. Greyhound Food Mgmt. Inc.*, 639 F. Supp. 1448, 1454 (W.D. Mich. 1986), *app. dism.* 815 F.2d 76 (6th Cir. 1987).

employee has set out a *prima facie* case. App., *infra*, p. 14a, citing *Cooper* and *Pyro Mining*. "[R]easonable accommodation is not part of the *prima facie* case, the basis on which the district court decided the case. As we uphold the district court on the same basis, we do not rule on the reasonable accommodation question." App., *infra*, p. 14a.

REASONS FOR GRANTING THE WRIT

As this Court has noted, Congress hoped that imposing upon an employer a duty to accommodate an employee's religion would engender "bilateral cooperation" between employer and employee "in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Ansonia*, 479 U.S. at 69, quoting *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 145-46 (5th Cir. 1982) (internal quotations omitted). Indeed, in holding that an employer was not automatically bound to accept the accommodation proposed by the employee, the Court expressed concern that a contrary rule would give the employee "every incentive to hold out for the most beneficial accommodation, despite the fact that an employer offers a reasonable resolution of the conflict." 479 U.S. at 70.

The decision below prompts the converse fear. Permitting employers to avoid completely any obligation to accommodate until after an employee has been either disciplined or discharged gives *employers* every incentive to hold out until the employee, in frustration, bends to the employer's work rule or quits in frustration. The writ should be granted because such a rule is inconsistent with Congressional intent and

purpose and is inconsistent with decisions in other courts of appeals.

I. Review Is Warranted Because The Ruling Below Is Inconsistent With Congressional Purpose And Intent.

The court of appeals' determination that no cause of action for failure to accommodate exists absent discipline or discharge is directly contrary to the Congressional purpose in amending Title VII to expand the definition of discrimination on account of religion.

When originally adopted in 1964, Title VII prohibited discrimination in employment on the basis of race, color, religion, sex, or national origin. The statute did not define discrimination in employment on the basis of religion in the context of a duty to accommodate, although the Equal Employment Opportunity Commission had adopted such a rule pursuant to authority delegated to it by Congress.

In *Dewey v. Reynolds Metals Company*, 429 F.2d 325 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971), the plaintiff brought suit after he was discharged for refusing to work mandatory overtime on Sundays, due to his religious convictions. 429 F.2d at 329. In holding for the employer, the court of appeals rejected the EEOC regulation, suggesting that it exceeded the scope of the statute. 429 F.2d at 331, n. 1. On rehearing, the court of appeals specifically addressed the accommodation issue, in language reminiscent of the sixth circuit's opinion in the instant case: "To construe the Act as authorizing the adoption of Regulations which would coerce or compel an

employer to accede to or accommodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment." 429 F.2d at 334.[3] "The fundamental error of Dewey and the Amici Curiae is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees." *Id.* at 335.

In response to this and other decisions, Congress adopted what is now codified at 42 U.S.C. § 2000e(j) "to illuminate the meaning of religious discrimination under the statute." *Ansonia*, 479 U.S. at 63, n. 1. As the Court has observed, while the structure of the statute remains somewhat "awkward," *id.*, its purpose was plainly to encourage employer and employee to work cooperatively toward a resolution of workplace conflicts between work rules and religious observance. *Id.*, at 69. This purpose is plainly frustrated if an employee is required to show, as part of a *prima facie* case, that he has suffered discipline or discharge as a result of a refusal to follow a work rule that conflicts with his religion.

Title VII was amended again, in 1991, in response to, *inter alia*, another Sixth Circuit decision,

---

[3] *Compare*, App., *infra*, p. 14a ("Employers who, while not offering a formal accommodation, deliberately turned a blind eye to employees' religiously motivated minor deviations from the letter of company policy – not an unusual situation one would imagine – would suddenly find themselves liable as civil rights offenders.").

Harrington v. Vandalia-Butler Board of Education, 585 F.2d 192 (6th Cir. 1978), cert. denied 441 U.S. 932 (1979). In *Harrington*, the court found that a female physical education teacher had been the victim of intentional employment discrimination in the terms and conditions of employment but reversed the district court's award of compensatory damages as unavailable under Title VII. 585 F.2d at 193-97. Congress then amended Title VII to expressly provide for compensatory damages:

> Strengthening Title VII's remedial scheme to provide monetary damages for intentional gender and religious discrimination is necessary to conform those remedies for intentional gender and religious discrimination to those currently available to victims of intentional race discrimination. [Monetary] damages also are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity. Such relief is also necessary to encourage citizens to act as private attorneys general to enforce the statute. Monetary damages simply raise the cost of an employer's engaging in intentional discrimination, thereby providing employers with additional incentives to *prevent* intentional discrimination in the workplace before it happens.

House Report No. 102-40(I), at 2 *U.S. Code Congressional and Administrative News* (1991) 549, 602-03 (emphasis in original).

Even prior to the 1991 amendments not all courts required a showing of discipline or discharge as a predicate to bringing suit for religious discrimination under Title VII, *see, e.g., Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403, 405 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (plaintiff only threatened with discharge). Nevertheless, the fact that most pre-amendment cases actually involved discipline or discharge is not coincidental because prior to 1991, a plaintiff's remedies under Title VII were solely equitable. As a practical matter, therefore, unless a plaintiff had been discharged (thus giving rise to the equitable remedy of back pay), a plaintiff could bring no claim seeking a monetary remedy, even if the violation of Title VII was clear. *See, e.g., Harrington* 585 F.2d at 193-94, 197.

As a matter of clear statutory language, an employer who fails to accommodate an employee's religious observation has engaged in discrimination on the basis of religion, and that employee is now entitled to maintain an action in damages. Because the decision below departs dramatically from the statutory scheme, review by this Court is warranted.

II. Review Is Warranted Because The Lower Federal Courts Are Divided Over The Question Whether A Plaintiff May Maintain A Cause Of Action For Failure To Accommodate In The Absence Of Discipline Or Discharge.

The decision below creates a clear circuit split over the question of whether a plaintiff must establish discipline or discharge as a component of a claim of failure to accommodate. As noted, *supra*, n. 1, the Second Circuit in *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 482-83 (2d Cir. 1985), *aff'd*, 479 U.S. 60 (1986), expressly rejected the contention upon which the decision below relies.

In addition, the Seventh Circuit Court of Appeals has assumed, without expressly deciding, that a "discipline or discharge" requirement is not a component of a failure to accommodate claim. *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998), *cert. denied*, 525 U.S. 1144 (1999) (police officer alleging a failure to accommodate stated claim without showing he had been disciplined or discharged). The Ninth Circuit similarly did not impose a discipline or discharge requirement in a case seeking to enjoin the failure to accommodate. *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981) (plaintiffs, Seventh-day Adventists who had neither been disciplined nor discharged, sought injunction to relieve them from paying union dues).

There is also a large class of cases in which the courts of appeals have stretched the doctrine of constructive discharge to supply artificially a

"discipline or discharge" requirement. *See, e.g., Bergstrom-Ek v. Best Oil Co.*, 153 F.3d 851, 858-859 (8th Cir. 1998) (reversing judgment as a matter of law because reasonable jury could find constructive discharge); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 574 (8th Cir. 1997) (holding employee establishes a constructive discharge if she quits "because she reasonably believes there is no chance for fair treatment."); *Wright v. Runyon*, 2 F.3d 214, 216-217, n.4 (7th Cir. 1993), *cert. denied*, 510 U.S. 1121 (1994) (notwithstanding the employee's voluntary termination, there was sufficient evidence from which the employee could *infer* that he would be disciplined for working on his Sabbath that the Court considered his termination to have been a constructive discharge), a consideration that the employer did not even challenge on appeal; *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403, 405 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (plaintiff only threatened with discharge stated claim for religious discrimination); *Young v. Southwestern Savings and Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975) (plaintiff facing potential discipline need not wait to be fired before leaving her employment).

Review in this case is merited in light of the confusion among the circuit courts on the issue presented.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Tony C. Merry
Counsel of Record
PALMER VOLKEMA THOMAS
140 East Town Street
Suite 1100
Columbus, Ohio 43215
(614) 221-4400
Attorneys for Petitioners

(Any footnotes trail end of each document)

No. 01-3888

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID A. GOLDMEIER
and TERRY C. GOLDMEIER,
Plaintiffs-Appellants,

v.

ALLSTATE INSURANCE COMPANY,
Defendant-Appellee.

March 25, 2003, Argued
July 24, 2003, Decided
July 24, 2003, Filed

COUNSEL: ARGUED: Tony C. Merry, PALMER, VOLKEMA & THOMAS, Columbus, Ohio, for Appellants.

Jon L. Fleischaker, DINSMORE & SHOHL, Louisville, Kentucky, for Appellee.

ON BRIEF: Tony C. Merry, PALMER, VOLKEMA & THOMAS, Columbus, Ohio, for Appellants.

Jon L. Fleischaker, DINSMORE & SHOHL, Louisville, Kentucky, Jerome C. Tinianow, Columbus, Ohio, for Appellee.

JUDGES: Before: BOGGS and SILER, Circuit Judges; and STEEH, District Judge. *

OPINION BY: BOGGS

OPINION:

BOGGS, Circuit Judge. Plaintiffs Terry C. and David A. Goldmeier (the "Goldmeiers") appeal the district court's grant of summary judgment to defendant Allstate Insurance Company ("Allstate"), their former employer, in their action for religious discrimination, in violation of both federal and Ohio state law. The Goldmeiers, husband and wife, are Sabbath-observant Orthodox Jews. They had resigned their positions as insurance agents with Allstate after the company announced plans to require offices to remain open on Friday evenings and Saturday mornings. Because they had not suffered discipline or discharge over this conflict, but instead resigned prior to the effectiveness of the new policy, the United States District Court for the Southern District of Ohio dismissed their complaints for failure to make a prima facie case. We affirm.

I

The Goldmeiers began working as Allstate insurance agents in the late eighties. They ran an Allstate office first in Bexley, Ohio, and later in Lewis Center, Ohio. While the Goldmeiers had a great deal of discretion in how they ran their own offices, including allocation of administrative expenditures, it is undisputed that they were not independent contractors, but employees of Allstate. The Goldmeiers are also Sabbath-observant Orthodox Jews and as such followed a religious

prohibition against working from sundown Friday until sundown Saturday. Until 1998, they accommodated their religious and work requirements by closing their office earlier on Fridays in the winter months when the sun set before regular closing hours and always keeping it closed on Saturdays and Jewish holidays. In September 1998, Allstate announced new Service Availability Standards ("SAS"). The SAS required that, beginning on January 1, 1999, all offices had to remain open until 6 PM on Fridays and, beginning on July 1, 1999, from 9 AM to 1 PM on Saturdays. While an open office did not explicitly require the Goldmeiers' presence, it did require the presence of a licensed insurance agent at all times and the Goldmeiers were the only such agents in their office. Allstate employees were advised that failure to comply with the new policy could lead to discipline, up to and including discharge.

In response, the Goldmeiers informed Allstate that the new policy conflicted with the demands of their religion and initiated discussions in order to find an accommodation. Initially, Allstate indicated that there would be no exceptions to the office hours policy. Allstate suggested that the Goldmeiers could hire a licensed insurance agent to cover the hours they would not be present. Such part-time help had to be provided by an Allstate-approved list of "vendors," but could be funded out of the office expense allowance that the company allocated to each office. When the Goldmeiers' children were young, they had used these funds to hire outside office assistance. Nevertheless, at this time outside help was not acceptable to the Goldmeiers for multiple reasons. They contended that the office expense allowance would be insufficient to pay for an additional agent and that they would be required to

cover any deficit in the allowance out of their personal funds, as they had been required to do in previous years. Moreover, the Goldmeiers would have been responsible for the performance of the office even in their absence and they "did not want to trust [their] financial security to a vendor possibly finding someone to work while [they] weren't there." Hence the Goldmeiers did not investigate this option further.

On November 16, 1998, the Goldmeiers informed Allstate that they considered themselves to be constructively discharged and resigned their positions. As the Goldmeiers conceded at oral argument, this resignation came as a surprise to Allstate. In response, Allstate now offered to allow the Goldmeiers to observe the Sabbath but to work on Sundays instead, an offer the Goldmeiers had earlier made, but which had then been rejected by Allstate. The Goldmeiers now rejected this compromise because Allstate did not make the offer in writing and the Goldmeiers had, even before tendering their resignations, accepted new positions with another employer. On January 1, 1999, the new Allstate policy went into effect. The first Friday after the SAS went into effect that also was a regular working day was January 8, 1999, fifty-three days after the Goldmeiers resigned.

On October 20, 1999, the Goldmeiers filed a complaint against Allstate in federal district court. They alleged employment discrimination on religious grounds, in violation of 42 U.S.C. § 2000e, a parallel state law claim, under Ohio Rev. Code § 4112, and discharge contrary to the public policy embodied in § 4112. On July 13, 2001, the district court granted summary judgment to Allstate on the grounds that the Goldmeiers had not

suffered an adverse employment action and therefore failed to make out a prima facie case of religious discrimination. The district court also denied the state law claim of discharge contrary to public policy because it concluded the Goldmeiers had not been discharged. Before this court now is the Goldmeiers' timely appeal of the grant of summary judgment.

II

"Title VII makes it unlawful for an employer to 'discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's religion.'" *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994) (quoting 42 U.S.C. § 2000e-2(a)(1), internal alterations omitted); *accord Virts v. Consol. Freightways Corp.*, 285 F.3d 508, 516 (6th Cir. 2002).The employee bears the burden of establishing a prima facie case, and sustains that burden by showing that he holds a sincere religious belief that conflicts with an employment requirement; that he has informed his employer of the conflict; and that he was discharged or disciplined for failing to comply with the conflicting requirement.*Cooper*, 15 F.3d at 1378 (citing *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987)); *accord Virts*, 285 F.3d at 516. Religious discrimination can arise out of an employer's failure to "accommodate those employees who refuse to work on particular days of the week because of their religious beliefs." *Pyro Mining Co.*, 827 F.2d at 1085.

In the present case, the parties agree that the Goldmeiers sincerely hold a religious belief barring them from work on the Sabbath and that they had

informed their employer of that belief. Therefore the existence of a prima facie case depends on two disputed propositions, whether that religious belief conflicted with the SAS and whether they were discharged or disciplined for failing to comply with the SAS.

Allstate contends that the SAS did not conflict with the Goldmeiers' religious beliefs because it did not directly require them to work on the Sabbath. The SAS merely required that the office would remain open during Sabbath hours, but did not prevent them from hiring substitute agents out of their office expense allowance, allowing the Goldmeiers to comply with both the SAS and their religious requirement. In this regard the factual situation differs from the more common religious discrimination case in which the employer explicitly requires an employee to work during the Sabbath. The employment requirement here only placed an additional burden on the religious observance, the expenditure of the limited office expense allowance or the Goldmeiers' personal funds.

Nevertheless, where the conflict between an employee's religious belief and an employer's requirement can only be removed by the employee's forfeiture or expenditure of a substantial benefit available to other employees, we hold that conflict sufficient to establish a prima facie religious discrimination case exists. n1 In *Cooper*, we ruled on a similar argument with respect to vacation time:We recognize that use of vacation time legitimately may be required to allow an employee to avoid work on religious holidays or, in combination with other methods, to allow an employee to regularly avoid working on the Sabbath. Under appropriate

circumstances, this use of a portion of an employee's vacation entitlement may be reasonable. In this case, however, Cooper was faced with the choice of working on the Sabbath or potentially using all of her accrued vacation to avoid doing so. *Getz v. Pennsylvania*, 802 F.2d 72 (3d Cir. 1986); *United States v. City of Albuquerque*, 545 F.2d 110, 113-14 (10th Cir. 1976). An employer who permits an employee to avoid mandatory Sabbath work only by using accrued vacation does not "reasonably accommodate" the employee's religious beliefs. Such an employee stands to lose a benefit, vacation time, enjoyed by all other employees who do not share the same religious conflict, and is thus discriminated against with respect to a privilege of employment.*Cooper*, 15 F.3d at 1379 (internal citation form normalized). n2 By the same token, the Goldmeiers were faced with a choice of violating the Sabbath or hiring outside staff using either their own funds or their limited office expense allowance, otherwise available for other business-enhancing purposes to other agents. n3 Such an incompatibility between an employment and a religious requirement is sufficient to create a conflict.

We have consistently held that a prima facie case of religious discrimination requires discharge or discipline for failure to comply with an employment requirement conflicting with a religious requirement. *See, e.g.*, *Cooper*, 15 F.3d at 1378; *Pyro Mining Co.*, 827 F.2d at 1085; *Virts*, 285 F.3d at 516-17. In the present case it is undisputed that the Goldmeiers were not actually discharged or disciplined. To remedy this defect fatal to their case, the Goldmeiers offer two alternative theories: that they were constructively discharged and

that the 1991 Civil Rights Act amendments *sub silentio* eliminated the discharge requirement.

The Goldmeiers maintain that they were constructively discharged. "To constitute a constructive discharge, the employer must deliberately create intolerable working conditions, as perceived by a reasonable person, with the intention of forcing the employee to quit and the employee must actually quit." *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1080 (6th Cir. 1999); *see also Logan v. Denny's, Inc.*, 259 F.3d 558, 568-69 (6th Cir. 2001). In the case of constructive discharge, "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 887 (6th Cir. 1996) (quoting *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982)). "In determining whether an environment is one that a reasonable person would find hostile or abusive and that the plaintiff in fact did perceive to be so, courts look at all of the circumstances." *Hafford v. Seidner*, 183 F.3d 506, 512 (6th Cir. 1999). Such circumstances include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's performance." *Harris v. Forklift Sys.*, 510 U.S. 17, 23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993); *accord Abeita v. TransAmerica Mailings, Inc.*, 159 F.3d 246, 251 (6th Cir. 1998); *Hafford*, 183 F.3d at 512. The circumstances are examined from the point of view of a reasonable member of the protected class. *See Yates v. Avco Corp.*, 819 F.2d 630, 636-37 & n.2 (6th Cir. 1987) (evaluating whether sexual harassment constitutes constructive

discharge from the point of view of a reasonable member of the gender being harassed).

Under these standards, Allstate did not expose the Goldmeiers to a work environment so hostile and abusive as to compel a reasonable Orthodox Jewish couple to quit, rather than tolerate it for one more day. The Goldmeiers' physical work environment was their own office, selected, staffed, and controlled exclusively by themselves and hence could hardly have been intolerable to them. Their broader corporate environment consisted of regular contacts with Allstate management. Prior to the announcement of the new SAS in 1998, the Goldmeiers cite a few instances of religious incompatibility with Allstate. David Goldmeier forfeited two pleasure trips, one to Las Vegas and one to the Bahamas, that Allstate had awarded him in recognition of his services because they had been scheduled on the Sabbath and Rosh Hashanah, respectively. The Goldmeiers also were unable to participate in a previous, voluntary, Premier Service Agency program, because it too had required their office to be open on Saturdays. The Goldmeiers do not allege that any Allstate representative ever made any discriminatory, hostile, offensive, humiliating, or physically threatening comment towards them. The Goldmeiers do not even allege that any comment, however innocuous, with respect to their religion was ever made by an Allstate representative. Moreover, until the Goldmeiers' abrupt resignation, no action undertaken by Allstate seems to have substantively interfered with the Goldmeiers' effective performance of their work. To the contrary, the Goldmeiers express how much they enjoyed their work at Allstate for more than a decade.

Finally, in 1998, there was the announcement of the Service Availability Standards. Allstate intransigently refused to adjust the new office hours to be more congenial to the Goldmeiers. This intransigence, if it had not been tempered, as in fact it was, could potentially have led to an actual discharge at some point in the future. The Goldmeiers cite *Cooper* for the proposition that the mere prospect of discipline at some future point in time is sufficient to create a hostile work environment. However, Cooper resigned the day before her Sabbath absence would, cumulatively with the discipline for her earlier Sabbath absences, inevitably have led to her suspension under the employer's announced rule. *Cooper*, 15 F.3d at 1378, 1379 n.1. Thus, the threat of discharge had an immediacy which contrasts sharply with the circumstances of the Goldmeiers who continued to work for Allstate until both of them had found new employment and then resigned fifty-three days before there would have been the first actual conflict between their religious and employment requirements. Even in combination, all circumstances of employment cited by the Goldmeiers are legally insufficient to create an intolerably hostile work environment.

The Goldmeiers' constructive discharge claim also fails independently for lack of evidence that Allstate "deliberately created intolerable working conditions . . . with the intention of forcing" the Goldmeiers to quit. *Moore*, 171 F.3d at 1080. "To determine if there is a constructive discharge, both the employer's intent and the employee's objective feelings must be examined." *Ibid.* (citing *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982)). The seemingly stringent intent requirement can, however, be met "by demonstrating that quitting

was a foreseeable consequence of the employer's actions." *Ibid.* Allstate's offer of compromise after the Goldmeiers quit, on terms the Goldmeiers had earlier proposed, nevertheless, strongly suggests the absence of any such intent. While it is conceivable that this offer was not made in good faith and for the sole purpose of avoiding a claim such as the Goldmeiers raise here, there is no evidence to support a finding of such an elaborate ruse. Therefore, we conclude that there was no genuine issue of material fact that the Goldmeiers were not constructively discharged.

In the alternative to a finding that they were constructively discharged, the Goldmeiers argue that the discipline or discharge requirement found in our case law is a vestige of the pre-1991 employment discrimination law. *See, e.g., Pyro Mining Co.*, 827 F.2d at 1085 (decided in 1987); *Cooper*, 15 F.3d at 1378 (decided in 1994 but adjudicating a claim arising in 1987). Prior to 1991, relief in employment discrimination suits was limited to injunctive and equitable relief, such as back pay. 42 U.S.C. § 2000e-5(g). Under this law, absent discharge or discipline, there would have been little a court could have done to help a victim of employment discrimination. The Goldmeiers argue that this court, as well as numerous other courts, inadvertently turned this limitation on remedies into an element of the prima facie case. The 1991 amendments expanded the remedies available for intentional employment discrimination by authorizing compensatory and punitive damages. 42 U.S.C. § 1981a(a)(1). With these remedies, even a victim of employment discrimination who was not discharged or disciplined could be offered relief by the court. Hence, they argue, the discharge requirement repeatedly

stated in our case law is obsolete and should not be enforced against them.

Nevertheless, for a number of reasons, we hold that discharge or discipline remains an element of a prima facie cases of religious discrimination in employment. First, we recently so held in a case undisputably interpreting the post-1991 statute. In *Virts*, arising out of events occurring in 1997, we reiterated that "to establish a prima facie case, a plaintiff must demonstrate that . . . he was discharged or disciplined for failing to comply with the conflicting employment requirement." 285 F.3d at 516 (citing *Pyro Mining Co.*, 827 F.2d at 1085). Even were we so inclined, absent circumstances not present here, no panel of this court has the authority to overrule the previous, published decision of another panel. *See, e.g., Goad v. Mitchell*, 297 F.3d 497, 503 (6th Cir. 2002) (citing *Salmi v. Secretary of Health & Human Services*, 774 F.2d 685, 689 (6th Cir. 1985)).

Second, despite an impressive tour through the circuits, the Goldmeiers fail to discover even a single federal appellate case in the twelve years since the enactment of the amendments holding that the discharge or discipline requirement has been eviscerated. Rather, the Goldmeiers quote language requiring reasonable accommodation, trying to imply that reasonable accommodation is required without any condition precedent, without mentioning that these statements follow a previous finding, or defendant's concession, of a prima facie case. *See, e.g., Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68, 93 L. Ed. 2d 305, 107 S. Ct. 367 (1986) (explicitly declining to rule on the existence of a prima facie case where employee was not

discharged); *Rodriguez v. City of Chicago*, 156 F.3d 771, 774-75 (7th Cir. 1998) (noting that "the [employer] had conceded that [the plaintiff] had established a prima facie case of religious discrimination" and beginning its analysis with "the issue of whether the [employer] has satisfied its duty of reasonable accommodation"). The Goldmeiers also point to one case in another circuit which upheld an injunction against an employer barring it from discharging an employee who for religious reasons refused to pay certain union dues. *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981); *see also Rodriguez*, 156 F.3d at 774 (noting that the plaintiff had requested injunctive relief). But the *Tooley* court was considering the grant of an injunction, a form of relief that is necessarily directed at the prevention of some *future* violation of the law, and the future violation considered there, discharge, was exactly of the type that the Goldmeiers now argue need no longer be shown. Conversely, the Goldmeiers filed an action for damages, which must be based on the defendant's *past* adverse employment actions. n4 The fact remains that neither this court, nor any of its sister circuits with substantively parallel religious discrimination jurisprudence, has ever endorsed the Goldmeiers' conclusion that no adverse employment action need be shown to sustain a prima facie case.

Third, reading the discipline or discharge requirement out of the prima facie case creates significant analytical difficulties. Absent this requirement, a prima facie case would lie wherever there was a sincere conflict and compensation would be due when, in addition, the employer does not immediately adopt a reasonable accommodation. What a successful religious discrimination claim would not require would be any

actual employer action to the detriment of the employee. Employers who, while not offering a formal accommodation, deliberately turned a blind eye to employees' religiously motivated minor deviations from the letter of company policy-not an unusual situation one would imagine-would suddenly find themselves liable as civil rights offenders.

Finally, we note that we have previously rejected a parallel argument. *Hiler v. Brown*, 177 F.3d 542, 546-47 (6th Cir. 1999) (rejecting argument that the 1991 amendments by allowing compensatory damages implicitly expanded the class of potential employment discrimination defendants beyond employers). For these reasons, we decline to follow the Goldmeiers' suggestion to remove the discipline or discharge requirement.

The parties expend considerable energy on the reasonable accommodation question prominent in the religious discrimination case law. "Once a prima facie case is established, the burden shifts to the employer to show that it could not reasonably accommodate the employee without undue hardship." *Cooper*, 15 F.3d at 1378 (citing *Pyro Mining Co.*, 827 F.2d at 1085). "To require an employer to bear more than a *de minimis* cost in order to accommodate an employee's religious beliefs is an undue hardship." *Cooper*, 15 F.3d at 1378 (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 53 L. Ed. 2d 113, 97 S. Ct. 2264 (1977)). But reasonable accommodation is not part of the prima facie case, the basis on which the district court decided the case. As we uphold the district court on the same basis, we do not rule on the reasonable accommodation question.

The Goldmeiers' other claims must fail for reasons already elucidated. Ohio State employment discrimination law under O.R.C. § 4112 tracks federal law under 42 U.S.C. § 2000e-5. *Ohio Civ. Rights Comm. v. David Richard Ingram, D.C., Inc.*, 69 Ohio St. 3d 89, 1994 Ohio 515, 630 N.E.2d 669, 672 (Ohio 1994). Therefore, when their federal religious discrimination claim failed, so did their state religious discrimination claim. The Goldmeiers' wrongful discharge state law claim must also fail for reasons already given. They resigned and were not discharged, actually or constructively. Therefore, they have no claim under this heading.

III

For the foregoing reasons, we AFFIRM the judgment of the district court.

Footnotes

* The Honorable George C. Steeh, United States District Judge for the Eastern District of Michigan, sitting by designation.

n1 This is not to say that every such conflict results in a valid religious discrimination claim. Many conflicts of this type will still fail to give rise to such a claim under the reasonable accommodation part of the test. However, the search for reasonable accommodation is not part of the prima facie case.

n2 This discussion in *Cooper* occurs within the context of the reasonable accommodation analysis. But that circumstance only strengthens our conclusion. If

requiring an employee to use up all of her vacation time to avoid working on the Sabbath is not a reasonable accommodation of a religious conflict, it *a fortiori* is not a resolution that eliminates the very existence of a religious conflict.

n3 The parties extensively dispute the cost and availability of such support staff and whether the office expense allowance could have been expected to completely cover it. However, there appears to be no dispute that the expense would have been greater than the allowance or would have at least consumed a substantial fraction of the allowance. As the Goldmeiers would have been substantively adversely affected by this expenditure in either case, we need not resolve this factual dispute.

n4 We need not and do not decide whether the Goldmeiers' action, if brought for injunctive relief against enforcement of the SAS instead of, or in addition to, damages, could have been sustained by the district court on the facts alleged here.

Case No. 2:99-CV-1091
Magistrate Judge King

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

David Goldmeier, et al.,
Plaintiffs,

v.

Allstate Insurance Company,
Defendants.

Filed July 16, 2001

OPINION AND ORDER

Plaintiff's in this action assert claims of religious discrimination in violation of Title VII,

42 U.S.C. §2000e-5, and Ohio Revised Code Chapter 4112, constructive discharge, and wrongful discharge in violation Of Ohio's public policy, Upon the consent of the parties, 28 U.S.C. §636(c), this matter is now before the Court on defendant's motion for summary judgment,

I. Background

David and Terry Goldmeier are Orthodox Jews. Deposition of David Goldmeier at 33. Their faith forbids them from working during their Sabbath, which runs from sundown on Friday evening until sundown on

Saturday evening. Id., at 37 The Goldmeiers are also former employees of Allstate Insurance Company. They joined the Allstate sales force in the mid-1980's. Id., at 9; Deposition of Terry Goldmeier, at 7. The Goldmeiers operated an agency office in Bexley, Ohio, until the fall of 1997, when they moved their agency to Lewis Center, Ohio, David Goldmeier Depo., at 50-51, 77-18. To observe their Sabbath, the Goldmeiers closed their office early on Friday evenings during the winter, and also closed their office on certain Jewish holidays. David Goldmeier Depo., at 18, 36-38.

During the summer of 1998, the Goldmeiers began to hear "some talk that Allstate would be requiring offices to be open on Saturday," Id., at 17. They questioned Graham Powers, their Agency Manager, about the rumored change in agency hours and were told that Powers did not know anything about such a change Id. The Goldmeiers reminded Powers that they did not work on Saturdays because it was their Sabbath, and asked him to find out whether they could substitute Sunday hours for Saturday hours. Id., at 18. On August 31, 1998, Powers informed the Goldmeiers that Allstate was indeed implementing new office hours that would require offices to be open from 9:00 a.m. until 6:00 p.m., Monday through Friday and 9:00 a.m. to 1:00 p.m. on Saturday, Id., at 18-19. Powers told the Goldmeiers that there would be no exceptions from this schedule. fn1 Id., at 19.

On September 8, 1998, the Goldmeiers each attended a meeting for Central Ohio agents. Copies of the new Allstate Agency Standards were distributed to the agents and discussed. Id., at 139. The Allstate Agency

Standards included new standard entitled "Service Availability," which provided in pertinent part:

Agency will be open during Allstate designated hours:

-From 9:00 AM to 6:00 PM on weekdays (except for Company approved holidays for agencies).
-From 9:00 AM to 1:00 PM on Saturdays (except for Company approved holidays for agencies).

There must be a licensed professional present during all hours in which the agency is open.

Defendant's Exhibit 34 Attached to Appendix to Motion for Summary Judgment. The Service Availability Standard also provided that the effective date of the standard as it related to weekday hours Would be January 1, 1999 and, as it related to Saturday flours and to the requirement that a licensed professional be present in the office, would be July 1, 1999, Id. Allstate's regional vice president. Doug Carpenter, informed the agents that there would be no exceptions to the standard. David Goldmeier Depo., at 131. However, he further explained that support staff could be hired to cover the hours that agents were unavailable and that the agents could pay for such staff out of their office expense allowance. Id., at 142-43, Allstate also provided a list of 13 vendors whom the agents could contact to obtain that support staff. Terry Goldmeier, at 40; Defendant's Exhibit 31 Attached to Appendix to Motion for Summary Judgment. There is no evidence that plaintiffs investigated the availability, cost or reliability of support personnel. David Goldmeier Depo., at 138, 146, 147, 151. fn2

Carpenter conceded that hiring support staff would impose a financial burden on those agents with "low revenue streams." Deposition of Doug Carpenter, at 17, Although plaintiffs assert, in their memorandum contra the motion for summary judgment, that they "were among those agents with low revenue streams who would be burdened financially by the additional staffing requirement," Plaintiff's 'Memorandum in Opposition to Defendant's Motion for Summary Judgment, at 5, plaintiffs offer no evidence in support of this assertion. David Goldmeier testified that plaintiffs' Bexley area office performed "[a]verage or above average" relative to other Allstate agencies in the Columbus area, David Goldmeier Depo., at 59, and that the performance of their Lewis Center office, to which plaintiffs moved to avoid slowed growth rates, Id., at 88; Terry Goldmeier Depo., at 26, was "in some areas higher and in some other areas in the middle" relative to other agencies in their district. Id., at 98-99.

On October 7, 1998, David Goldmeier contacted LeRon Tibbs, the human resources representative Allstate had assigned to the sales territory in which the Goldmeiers worked, in order to request a variation from the Service Availability Standard. David Goldmeier Depo., at 24; Deposition of LeRon Tibbs, at 25. After consulting senior management, Tibbs called the Goldmeiers and informed them that there would be no exceptions to the Service Availability standard. Defendant's Exhibit 23 Attached to Appendix to Motion for Summary Judgment, Interrogatory No. 1. When David Goldmeier asked what to do if support staff failed to report for work, Tibbs told him to formulate "contingency plans," David Goldmeier Depo., at 27; Tibbs Depo., at 27.

On November 16. 1998, prior to the effective date of the new standard but after both plaintiffs had obtained other employment, the Goldmeiers informed Graham Powers that they were leaving their employment with Allstate because the company would not accommodate their observance of the Sabbath, Deposition of Graham Powers, at 24-25. In December 1998, following the Goldmeiers' resignation, Mark Humiston, Allstate's Human Resources Manager for the Hudson Region, spoke with David Goldmeier and offered to allow plaintiffs to work on Sundays instead of Saturdays Deposition of Mark Humiston at 15; David Goldmeier Depo., at 180-81. However, the Goldmeiers rejected the offer for several reasons, including the fact that Humiston would not put the offer in writing. David Goldmeier Depo., at 182.

II. Discussion

A. Standard for Summary Judgment

Defendant moves for summary judgment on all of plaintiffs' claims. Fed. R. Civ. P. 56(c) provides in pertinent part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Pursuant to Fed. R. Civ. P. 56(c), summary judgment is appropriate if "there is no genuine issue as to any material fact . . . ." In making this determination, the

evidence must be viewed in the light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). However, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial, Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The mere existence of a scintilla of evidence in support of the opposing party's position will be insufficient; there must be evidence on which the jury could reasonably find for the opposing party. Anderson, 477 U.S. at 251.

B. Plaintiffs' Claims of Religious Discrimination

Plaintiffs claim that Allstate discriminated against them on the basis of their religion in violation of Title VII and O.R.C. Chapter 41 12. Defendant argues that plaintiffs cannot establish a prima facie case of religious discrimination because the Service Availability Standard does not require any Allstate agent to personally work on Friday after sundown or on Saturday or on Jewish holidays. Allstate also argues that it did not discipline or discharge the Goldmeiers for failing to comply with the Service Availability Standard. Furthermore, Allstate contends that even if plaintiffs can establish a prima facie case, it reasonably accommodated the Goldmeiers by permitting support staff during the hours that plaintiffs were unavailable. Finally, Allstate maintains that it is entitled to summary judgment on plaintiffs' claim of constructive

discharge because the Goldmeiers cannot establish that their working conditions were so intolerable that a reasonable person would have resigned their employment.

Plaintiffs respond that they were constructively discharged by Allstate and that, even if they were not, the financial burden placed upon the Goldmeiers for exercising their religious convictions, a burden not borne by Other Allstate agents whose faith does nor require them to observe a Saturday Sabbath, discriminated against them. Plaintiffs also argue that Allstate did not attempt to accommodate their religious beliefs because the provision regarding staff Support applied to all agents who could not be present in the office during required working hours, and not just to those agents with religious concerns.

Plaintiffs assert claims of religious discrimination under state, as well as federal, law. "The Ohio Supreme Court has ruled that federal case law interpreting and applying Title VII is generally applicable to cases involving [R.C. Chapter] 4112." Genuro v. Central Transport, Inc., 84 Ohio St.3d 192, 196 (1981); Franks v. National Lime & Stone Co., 138 Ohio App.3d 124, 128 (Hancock Cy. 2000)[federal case law interpreting religious discrimination laws is applicable to the interpretation of Ohio laws]. Title VII provides in pertinent part that "[I]t shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . ." 42 U.S.C. §2000e-2(a). "The term

'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business," 42 U.S.C. 2000e(j).

The United States Court of Appeals for the Sixth Circuit "employs a two-step analysis in evaluating Claims of religious discrimination." EEOC v. Arlington Transit Mix, Inc., 957 F.2d 219, 221 (6th Cir. 1991). First,

[t]he employee bears the burden of establishing a prima facie case [of religious discrimination], and sustains that burden by showing that [1] he holds a sincere religious belief that conflicts with an employment requirement; [2] that he has informed his employer of the conflict; and [3] that he was discharged or disciplined for failing to comply with the conflicting requirement.

Cooper v. Oak Rubber Co., 15 F.3d 1375, 1378 (6th Cir. 1994). See also Arlington Transit Mix, 957 F.2d at 221; Smith v. Pyro Mining Co., 827 F.2d 1081, 1085 (6th Cir. 1987). "Once a prima facie case is established, the burden shifts to the employer to show that it could not reasonably accommodate the employee without undue hardship." Cooper, 957 F.2d at 1378. "The obligation to accommodate includes efforts to accommodate those employees who refuse to work on particular days of the week because of their religious beliefs." Pyro Mining Co., 827 F.2d at 1085. "The reasonableness of an employer's attempt to accommodate is determined on a case-by-case basis." Cooper, 15 F.3d at 1378. "[A]ny reasonable accommodation by the employer is

sufficient to meet its accommodation obligation." Pyro Mining Co., 827 F.2d at 1085 (quoting Ansonia Bd. Of Educ. v. Philbrook, 479 U.S. 60, 68 (1986)). Additionally, if an employer has provided a reasonable accommodation, it is under no obligation to accept an employee's proposed accommodation. Philbrook, 479 U.S. at 68. Furthermore, "[a]lthough the burden is on the employer to accommodate the employee's religious needs, the employee must make some effort to cooperate with an employer's attempt at accommodation." Pyro Mining Co., 827 F.2d at 1085.

An employee cannot shirk his duties to try to accommodate himself or to cooperate with his employer in reaching an accommodation by a mere recalcitrant citation of religious precepts. Nor can he thereby shift all responsibility for accommodation to his employer. Where an employee refuses to attempt so accommodate his own beliefs or to cooperate with his employer's attempt to reach a reasonable accommodation, be may render an accommodation impossible.

Id.

An essential element of plaintiffs' prima facie case is that they have suffered an actual or threatened adverse employment action, such as discharge or discipline, Cooper v. Oak Rubber Co., 15 F.3d at 1378. fn3 In order to meet this element, plaintiffs must prove that they were subjected to a "materially adverse change in the terms and conditions of [their] employment." Hollins v. Atlantic Co., Inc., 188 F.3d 652, 662 (6th Cir, 1999).

[A] materially adverse change in the terms and conditions of employment must be more disruptive that

a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, demotion, evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Id. (quoting Crady v. Liberty Nat'l Bank & Trust Co. of Indiana, 993 F.2d 132, 136 (7th Cir. 1993)).

Plaintiffs allege that Allstate constructively discharged them from their employment by imposing, under threat of termination, a schedule that required the Goldmeiers to staff their office during times when their religious beliefs prohibited them from working. Constructive discharge occurs when "the proffered employment options would have been 'so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Wilson v. Firestone Tire & Rubber Co., 93 F.2d 510, 514 (6th Cir. 1991)(quoting Yates v. Avco Corp.. 819 F.2d 630, 636-37 (6th Cir. 1987)). "A finding of constructive discharge in this circuit requires an inquiry into both the objective feelings of an employee, and the intent of the employer," Yates, 819 F.2d at 636.37. "The employee's perception of forced resignation is judged objectively without consideration of any undue sensitivities." Wilson, 932 F.3d at 515. Furthermore, the presentation to the employee of other legitimate options for continued employment precludes a finding of constructive discharge. Id.

Although plaintiffs argue that they were constructively discharged because the Service Availability Standard adopted by Allstate required them to violate their religious beliefs, the Court notes that the new standard did not require that plaintiffs personally work on the Sabbath or Jewish holidays, The standard provided that support staff could cover the office when agents were not personally available for any reason. Plaintiffs respond that they were constructively discharged because the standard held them ultimately responsible for compliance with the standard; they contend that they would have been terminated if their support staff failed to report for work. The problem with this agreement is that it requires the Court to engage in speculation without any evidentiary support -- as to the character and reliability of support staff available to plaintiffs and to defendant's presumed response in the event a problem arose. fn4 While an employment action that would be objectively intolerable to a reasonable person may amount to a constructive discharge, an employee's subjective speculation cannot serve to transform an otherwise permissible employment decision into an actionable constructive discharge. See Darnell v. Campbell Cy. Fiscal Court, 731 F.Supp. 1309, 1312 (E.D. Ky. 1990), aff'd., 924 P.26 1057 (6th Cir. 1991). This Court holds that plaintiffs have failed to establish a constructive discharge.

Plaintiffs also contend that the Service Availability Standard imposed on them -- financial burden not borne by other agents. In making this argument, plaintiffs specifically refer to the office expense allowance made available to them. They concede that defendant provided a funded budget for certain specified types of expenditures, including support staff. David Goldmeier

Depo., at 142-43. Any amounts not spent were returned to defendant. Id., at 142, Expenses that exceeded the allowance were to be personally paid by the employee. Id., at 171. 72, However, to characterize the office expense account funded by defendant as "part of the package that Allstate put together to compensate us," David Goldmeier Depo., at 171, is to mischaracterize these funds. The funds that defendant provided could be used only for certain business-related expenses and, to the extent they were not exhausted, they were restored to defendant. Under no circumstances could plaintiffs personally benefit from those funds. Thus, permitting plaintiffs to use the funds in the office expense account to hire support personnel did not impose a financial penalty on them.

Plaintiffs also speculate that use of funds from the office expense account to hire support personnel could have exhausted the account and required them to personally subsidize other office expenses. However, plaintiffs' belief that they "may have had [at some unspecified time] expenses that exceeded the amount on the office expense allowance," David Goldmeier Depo., at 172, is simply insufficient to establish, even on proceedings under F.R. Civ. P. 56, that their compliance with the Service Availability Standard would have been reasonably likely to result in a financial penalty or other adverse employment action.

The Court therefore concludes that plaintiffs have failed to establish a prima facie case of religious discrimination under either Title VI or O.R.C. Chapter 4112.

B. Plaintiffs' Claim of Wrongful Discharge in Violation of Ohio's Public Policy

Plaintiffs also allege that defendant violated Ohio's public policy by discriminating against them based on their religion and by failing to accommodate their religious beliefs. In resolving this claim, this Court must apply the substantive law of Ohio as interpreted by the Supreme Court of Ohio. See Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938); Bools v. General Elec. Co., 70 F. Supp.2d 829, 831 (S.D. Ohio 1999). "In discerning how the Ohio Supreme Court would rule, this Court may look to decisions of Ohio's appellate courts." Bools, 70 F. Supp.2d at 832.

Ohio courts have recognized a public policy tort for wrongful discharge or discipline. E.g., Livingston v. Hillside Rehab, Hosp., 79 Ohio St.3d 249 (1997); Kulch v. Structural Fibers, Inc., 78 Ohio St.2d 134 (1997); Greeley v. Miami Valley Maintenance Contractors, Inc., 49 Ohio St.3d 228 (1990). However, "an employee may maintain a common-law cause of action against her employer pursuant to [Ohio's public policy] only 'so long as that employee . . . was subsequently discharged or disciplined.'" Bell, 129 Ohio App.3d at 465. See Bools, supra, 70 F. Supp.2d at 831-32 [dismissing public policy claim of wrongful failure to hire]; Evans v. ToysRUs, 32 F. Supp.2d 974, 990 (N.D. Ohio 1999) [granting summary judgment on public policy claim of failure to promote]; Bell v. Cuyahoga Community College, 129 Ohio App.3d 461, 465 (Cuyahoga 1998) [granting summary judgment on public policy claim for sexual harassment]. Because plaintiffs failed to establish that they were discharged or disciplined, either actually or constructively, this Court holds that plaintiffs' public

policy tort claims must fail as a matter of law. See Bools, 70 F. Supp.2d at 832.

III. Conclusion

Defendant's motion for summary judgment is GRANTED. The Clerk is DIRECTED to enter FINAL JUDGMENT in favor of defendant.

Norah McCann King
United States Magistrate Judge

Footnotes

fn1 Powers informed plaintiffs:

And don't bother asking about the Sunday hours because I already asked and spoke to management. I was told that Allstate is like a freight train. It's moving down the tracks. YOU either get on or you get off, and there will be no exceptions for anybody for these hours for any reason .... That includes religious..... There are no religious exceptions to these hours, Religious reasons don't count. .... No exceptions, business is business.

David Goldmeier Depo., at 18-19.

fn2 Plaintiffs testified on deposition that they did not pursue the option of procuring support personnel because "we did not want to trust our financial security to a Vendor possibly finding someone to work while we weren't there." David Goldmeier Depo., at 151. Similarly, plaintiffs did not consider combining offices with other agents willing to work on the Sabbath or

asking an individual agent from another office to cover for them on the Sabbath or Jewish holidays. Id. Terry Goldmeier Depo., at 48, 50, 56.

fn3 To the extent that plaintiffs appear to argue, plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment, at 11, that they need not establish an adverse employment action, the Court rejects that contention.

fn4 For example, David Goldmeier testified on deposition that he believed that he and his wife would be fired assuming that support personnel provided by an approved vendor, who was never contacted by plaintiffs, failed to appear for work and assuming further that defendant learned of that failure by "spot checks, visual, as well as telephone." David Goldmeier Depo., at 148-49.

Case No. C2-99-1091
Magistrate Judge King

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

David Goldmeier, et al.

vs.

Allstate Insurance Company

Filed July 16, 2001

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the Court for a trial by jury, The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] Decision by Court. This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that defendant's motion for summary judgment is granted

Date: July 16, 2001

Kenneth J. Murphy, Clerk

By Scott Miller/Deputy Clerk

(2)

No. 03-611

Supreme Court, U.S.
FILED
NOV 21 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DAVID A. GOLDMEIER
and TERRY C. GOLDMEIER,

Petitioners,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JON L. FLEISCHAKER, ESQ.
DINSMORE & SHOHL LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202
(502) 540-2300

Counsel of Record for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does an employee have a cause of action against an employer for failure to accommodate a religious conflict under 42 U.S.C. § 2000e(j) in the absence of proof of an adverse job action?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent respectfully submits this Corporate Disclosure Statement.

Respondent Allstate Insurance Company, an Illinois-domiciled insurance company, is a wholly-owned subsidiary of the Allstate Corporation, a Delaware corporation. The stock of the Allstate Corporation is publicly traded. No publicly-held entity holds 10% or more of the stock of the Allstate Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
ARGUMENT	4
I. THE SIXTH CIRCUIT CORRECTLY APPLIED TITLE VII SO AS TO REQUIRE PETITIONERS TO DEMONSTRATE AN ADVERSE EMPLOYMENT ACTION AS AN ELEMENT OF THEIR PRIMA FACIE CASE	4
II. THE CIRCUIT COURTS OF APPEALS AGREE THAT AN ADVERSE EMPLOYMENT ACTION IS A REQUISITE ELEMENT OF A TITLE VII RELIGIOUS DISCRIMINATION CLAIM FOR DAMAGES	8
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Anderson v. U.S.F. Logistics (IMC), Inc., 274 F.3d 470 (7th Cir. 2001) 10

Burlington Industries v. Ellerth, 524 U.S. 742 (1998) 5, 7

Equal Employment Opportunity Commission v. United Parcel Service, 94 F.3d 314 (7th Cir. 1996) 10

Goldmeier v. Allstate Insurance Co., 337 F.3d 629 (6th Cir. 2003) 6

Knight v. Connecticut Department of Public Health, 275 F.3d 156 (2d Cir. 2001) 9

Lawson v. Washington, 296 F.3d 799 (9th Cir. 2002) 11

Philbrook v. Ansonia Board of Education, 757 F.2d 476 (2d Cir. 1985) 8, 9, 10

Rodriguez v. City of Chicago, 156 F.3d 771 (7th Cir. 1998) 10

Rodriguez v. City of Chicago, 975 F. Supp. 1055 (N.D. Ill. 1997) 10

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) 7

Tiano v. Dillard Department Stores, 139 F.3d 679 (9th Cir. 1998) 11

Tooley v. Martin-Marietta Corp., 648 F.2d 1239 (9th Cir. 1981) 10

Turpen v. Missouri-Kansas-Texas R.R. Co., 736 F.2d 1022 (5th Cir. 1984) 9

Wright v. Runyon, 2 F.3d 214 (7th Cir. 1993) 10

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 2000e(j) 5

42 U.S.C. § 2000e-2(a)(1) 4

OTHER AUTHORITIES

House Report No. 102-40(I) at 64-65, *reprinted in* 1991 U.S.C.C.A.N. 549, 602-03 7

STATEMENT OF THE CASE

In this case Petitioners David and Terry Goldmeier (the "Goldmeiers") seek to turn on its head the long-established legal principle that in order to recover legal relief, a plaintiff must have sustained some injury or damages. They attempt to undermine Congress's intent that employees work with their employers to resolve workplace conflicts posed by good-faith religious practices, rather than merely quitting and suing. They ask this Court to overrule the logical and well-settled jurisprudence of every circuit court of appeals which has held that an employee who seeks damages for past discrimination under Title VII of the federal Civil Rights Act of 1964 must show that his employer took a materially adverse employment action against him. Ultimately, they cite no authority supportive of their position and offer no real issue worthy of this Court's consideration.

The Goldmeiers, who are Jewish and Sabbath-observant, worked for Allstate Insurance Company ("Allstate") as insurance agents for several years. In September 1998, Allstate announced that it intended to implement in two phases the following year a new work-hours policy, under which Allstate agency offices were to be open and staffed until 6:00 p.m. on weekdays from 9:00 a.m. to 1:00 p.m. on Saturdays. Though the policy did not require that the Goldmeiers themselves staff their office during the extended hours, the Goldmeiers perceived a potential conflict with their observance of the Sabbath on Friday evenings and Saturdays.

The Goldmeiers consulted with a superior and with an Allstate human resources representative about the potential

conflict. Each advised them that their office expense budget could be used to retain assistance to staff the office during the Sabbath hours. No one at Allstate threatened the Goldmeiers with termination, docking of pay, or any other discipline for failure to keep their office staffed in accordance with the prospective policy.

After indicating in writing in late October 1998 that they intended to remain at Allstate in 1999, the Goldmeiers suddenly resigned their employment on November 16 – *fifty-three days* before Allstate *began* to implement the work-hours policy which *might* have conflicted with their religious practices.[1] Importantly, the Goldmeiers obtained other employment before their resignation. They cited this as an excuse why they could not work for Allstate even after Allstate, shortly after their resignation, contacted the Goldmeiers in December 1998 and offered to accommodate them in full by letting them come in early and leave early on Fridays and work Sundays instead of Saturdays.

The Goldmeiers filed suit against Allstate in 1999, alleging discrimination based on the proposed work-hours policy and seeking monetary damages. The district court ultimately found, and the court of appeals affirmed, that the Goldmeiers had failed to state a prima facie case of religious discrimination under Title VII because they could

[1] The weekday hours policy was to go into effect on January 1, 1999; because that day was a holiday, the first Friday on which the Goldmeiers' religious observance possibly could have been impacted was January 8, 1999. The Saturday hours policy was to go into effect on July 1, 1999; the first Saturday on which the Goldmeiers' religious observance possibly could have been impacted was July 3, 1999.

not show that Allstate had taken an adverse employment action – in the form of discharge or other discipline – against them for failure to comply with Allstate's *proposed* work-hours policy.[2] Now, seeking this Court's review, the Goldmeiers argue that the court of appeals misapplied Title VII, defied the intent of the Civil Rights Act of 1991 (the "1991 act"), and contributed to an alleged conflict among the circuit courts of appeals as to whether a plaintiff alleging Title VII religious discrimination must allege and prove, in order to recover damages, tangible discrimination in the form of an adverse employment action.

As this brief will illustrate, the Goldmeiers' contentions are erroneous, and there is no issue in this case which justifies this Court's review.

REASONS FOR DENYING THE WRIT

Review is inappropriate for two reasons. First, the court of appeals' application of Title VII comports fully with the text of and legislative purposes behind Title VII.

Second, there is in fact no conflict among the circuits. Review of the Goldmeiers' cited authority reveals the purported circuit split to be much ado about nothing. The circuits whose authority the Goldmeiers cite concur with

[2] As noted, the Goldmeiers resigned their employment, but each court concluded that the resignations did not amount to constructive discharge because a reasonable employee in the Goldmeiers' position would not have felt compelled to quit. The Goldmeiers do not challenge these conclusions.

the Sixth Circuit in requiring a Title VII religious discrimination plaintiff to demonstrate some tangible harm before permitting legal relief.

ARGUMENT

I. THE SIXTH CIRCUIT CORRECTLY APPLIED TITLE VII SO AS TO REQUIRE PETITIONERS TO DEMONSTRATE AN ADVERSE EMPLOYMENT ACTION AS AN ELEMENT OF THEIR PRIMA FACIE CASE.

The Goldmeiers first assign error by arguing that the court of appeals misread Title VII so as to require them to demonstrate some tangible harm as an element of their claim for damages. The court of appeals' application of Title VII is logically sound, and in consonance with statutory text and history as well as this Court's past precedent.

"As a matter of clear statutory language," the Goldmeiers contend, "an employer who fails to accommodate an employee's religious observation has engaged in discrimination on the basis of religion, and that employee is now entitled to maintain an action in damages." (Petitioners' Appendix at 13.) The Goldmeiers miss an important nuance. Title VII forbids discrimination against an individual with respect to "the compensation, terms, conditions, or privileges of employment, because of such individual's [religion]."[3] 42 U.S.C. § 2000e-2(a)(1). A failure

[3] Religion is defined to "include[] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he

(Continued on following page)

to accommodate violates the law only to the extent that it is discrimination – *i.e.*, to the extent that it detrimentally affects the compensation, terms, conditions or privileges of employment. If an alleged failure to accommodate does not materially affect[4] the compensation, terms, conditions or privileges of employment, it is not actionable discrimination. The Goldmeiers have not alleged, and cannot prove, *any* discrimination by Allstate because they have identified no adverse effect upon the compensation, terms, conditions or privileges of their employment. This stands to reason because there was *nothing to accommodate*; the Goldmeiers quit and took other jobs long before the policy for which they desired accommodation ever took effect.

The Goldmeiers further argue that Congress's preference for bilateral employer-employee cooperation in the resolution of conflicts between employment requirements and religious practices "is plainly frustrated if an employee is required to show, as part of a *prima facie* case, that he has suffered discipline or discharge as a result of a refusal to follow a work rule that conflicts with his religion." (Pet. App. at 11.) However, in an action for damages, an element requiring that some materially adverse employment action must have been taken against a plaintiff is necessary, because

---

is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship. . . ." 42 U.S.C. § 2000e(j).

[4] *Cf. Burlington Industries v. Ellerth*, 524 U.S. 742, 761 (1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.")

> [a]bsent this requirement, a prima facie case would lie wherever there was a sincere conflict and compensation would be due when, in addition, the employer does not immediately adopt a reasonable accommodation. What a successful religious discrimination claim would not require would be any actual employer action to the detriment of the employee. Employers who, while not offering a formal accommodation, deliberately turned a blind eye to employees' religiously motivated minor deviations from the letter of company policy – not an unusual situation one would imagine – would suddenly find themselves liable as civil rights offenders.

Goldmeier v. Allstate Ins. Co., 337 F.3d 629, 637-38 (6th Cir. 2003) (*reprinted at* Pet. App. at 13a-14a). Put differently, if an employer sets a policy which, if enforced, would violate a certain employee's Title VII rights, but then *does not enforce* the policy against that employee, the employer essentially *has accommodated* that employee. Likewise, if an employer has *proposed* but *not implemented* a policy which in application might pose a conflict and possibly require accommodation, there can be no failure to accommodate because, until the policy is implemented, there is nothing to accommodate. Either way, if there is no detriment to the employee, there is no discrimination, and thus no ground for damages.

Unsurprisingly, the Goldmeiers cite no case law which supports their argument that, by making available compensatory damages, the 1991 act operated to somehow eviscerate the requirement that a plaintiff former employee actually have suffered some materially detrimental job action in order to recover damages. Plaintiffs cite the 1991 act's legislative history for the general principle that

compensatory damages were made available "to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity." (Pet. App. at 12, citing H.R. No. 102-40(I) at 64-65, *reprinted in* 1991 U.S.C.C.A.N. 549, 602-03.) However, if there is any doubt that Congress did not intend to subject employers to compensatory damages in the absence of harm, this legislative history settles it: "The bill would allow compensatory damages to be awarded only if a plaintiff proves *actual injury or loss* resulting from intentional discrimination." H.R. No. 102-40(I), at 74, *reprinted in* 1991 U.S.C.C.A.N. 549, 612.

Thus, neither the plain text of the relevant portions of Title VII, nor the legislative history behind their enactment, supports the Goldmeiers' spurious argument. Nor does this Court's prior precedent. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993) ("the *McDonnell Douglas* presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case – *i.e.*, the burden of producing evidence that the *adverse employment actions* were taken for a legitimate, nondiscriminatory reason.") (internal quotation marks, citation omitted); *Ellerth, supra*, 524 U.S. at 761 ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").

The Goldmeiers were not victims of discrimination. There was no "failure to accommodate" because the Goldmeiers resigned and took other jobs long before there was any conflict for Allstate to accommodate. Incredibly, the

Goldmeiers pursue monetary damages – a remedy for *past* discrimination – because they speculate that, at some point in the *future*, they would have been discriminated against, presumably by termination or some other penalty. It is clear from Title VII's text and history that such conjecture cannot be the basis of a claim for damages.

II. THE CIRCUIT COURTS OF APPEALS AGREE THAT AN ADVERSE EMPLOYMENT ACTION IS A REQUISITE ELEMENT OF A TITLE VII RELIGIOUS DISCRIMINATION CLAIM FOR DAMAGES.

The Goldmeiers attempt to construct a circuit split where there is none. Allstate can locate no authority which states that a plaintiff seeking damages for failure to accommodate need not demonstrate harm in the form of some adverse job action.

To illustrate discord among the circuit courts, the Goldmeiers rely primarily on *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476 (2d Cir. 1985), arguing that the Second Circuit Court of Appeals has "expressly rejected the 'discipline or discharge' element" of the prima facie case. (Pet. App. at 7, n.1., citing *Philbrook*, 757 F.2d at 482-83.) This is simply incorrect, as the plain text of *Philbrook* demonstrates:

> We first adopt the approach to plaintiff's prima facie case taken by several courts of appeal: A plaintiff in a [Title VII] case makes out a prima facie case of religious discrimination by proving: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) *he*

> *or she was disciplined* for failure to comply with the conflicting employment requirement.

Id. at 481 (citing *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984)). This was and is the law in the Second Circuit.[5]

The flaw in the Goldmeiers' reading of *Philbrook* is apparent on the face of their petition. To support their argument that the Second Circuit has rejected the "discharge or discipline" element of the prima facie case, they quote *Philbrook* selectively: "While we acknowledge that some courts have stated that *discharge* was required to make a prima facie showing of discrimination, Title VII prohibits not only discrimination in hiring and firing but also discrimination with respect to compensation, terms, conditions or privileges." (Pet. App. at 7, quoting *Philbrook*, 757 F.2d at 483 (internal quotation marks omitted, emphasis added)). When this excerpt is read in conjunction with *Philbrook's* explicit adoption of a "discipline" element, it is clear that the Second Circuit – like the other circuits, including the Sixth – requires an element of "discipline *or* discharge." The holding of *Philbrook* is that a plaintiff need not have been *discharged*, but rather may state a claim if he was *disciplined*.[6] To say that the Second

---

[5] *See, e.g., Knight v. Connecticut Dep't of Public Health*, 275 F.3d 156, 167 (2d Cir. 2001) ("To make out a prima facie case of religious discrimination, Knight and Quental must show (1) they held a bona fide religious belief conflicting with an employment requirement; (2) they informed their employers of this belief; and (3) *they were disciplined* for failure to comply with the conflicting employment requirement.") (citing *Philbrook*) (emphasis added).

[6] Petitioner Philbrook, in fact, had been disciplined by having his pay docked on days he missed work to observe religious holidays. *See*

(Continued on following page)

Circuit does not require a showing of some element of harm is simply to misread *Philbrook* and its progeny.

Nor does *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998), support the Goldmeiers' argument. Rather than "assum[ing], without expressly deciding, that a 'discipline or discharge' requirement is not a component of a failure to accommodate claim," as the Goldmeiers assert, in fact the court did not address that issue simply because it was not one preserved for and presented on appeal.[7] In fact, the Seventh Circuit, before and after *Rodriguez*, has required the adverse employment action element. *See, e.g., Equal Employment Opportunity Comm'n v. United Parcel Service*, 94 F.3d 314, 317 (7th Cir. 1996) ("An individual alleging religious discrimination must ordinarily show that: (1) a bona fide religious practice conflicts with an employment requirement, (2) he or she brought the practice to the employer's attention, and (3) *the religious practice was the basis for [an] adverse employment decision.*") (citing *Wright v. Runyon*, 2 F.3d 214, 216 n.4 (7th Cir. 1993)) (emphasis added); *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 478 n.2 (7th Cir. 2001) (same holding, citing *United Parcel Service*).

Finally, the Goldmeiers assert that in *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), the

---

Philbrook, 759 F.2d at 479. Accordingly, the court held, "it seems clear that *appellant suffered a detriment* from the conflict between his religious practices and the employment requirements." *See id.* at 482 (emphasis added).

[7] The City did not contend, in its motion for summary judgment before the district court, that Rodriguez had failed to establish a prima facie case. *See Rodriguez v. City of Chicago*, 975 F. Supp. 1055, 1058-59 (N.D. Ill. 1997).

Ninth Circuit Court of Appeals refrained from "impos[ing] a discipline or discharge requirement in a case seeking to enjoin the failure to accommodate." (Pet. App. at 14.) In fact, the court affirmed the district court's order which enjoined the defendant employer and labor union from *discharging* the plaintiffs for failure to pay union dues. Had the Goldmeiers remained at Allstate, had Allstate implemented the work-hours policy, had the policy impacted the Goldmeiers' religious practices, had Allstate refused to accommodate those practices, and had the Goldmeiers actually been immediately threatened with discharge or discipline, the Goldmeiers might have had grounds to sue for an injunction to compel Allstate to accommodate them; but those are not the circumstances in this case.

In any event, the Ninth Circuit repeatedly has stated the elements of a prima facie case, and they are the same as those required in other circuits. *See, e.g., Tiano v. Dillard Dep't Stores*, 139 F.3d 679, 681 (9th Cir. 1998) ("This court has established a two-part framework to analyze Title VII religious discrimination claims. First, the employee must establish a prima facie case by proving that (1) she had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) she informed her employer of the belief and conflict; and (3) the employer threatened her or subjected her to *discriminatory treatment, including discharge,* because of her inability to fulfill the job requirements.") (internal citation omitted) (emphasis added); *Lawson v. Washington*, 296 F.3d 799, 804 (9th Cir. 2002) (same holding). In an action for damages, mere failure to invent an accommodation is insignificant in the absence of some discriminatory treatment.

The Second, Seventh and Ninth Circuits are fully in accord with the Sixth Circuit on this point: to provide

grounds for compensatory damages, discrimination must be manifested in some tangible adverse action. This is the rule consistently applied throughout the circuits and properly applied here.

CONCLUSION

Rather than cooperate with Allstate to resolve the anticipated conflict, the Goldmeiers – after conveniently lining up new jobs – suddenly quit, with no notice to Allstate, fifty-three days before the new work-hours policy was scheduled to go partially into effect and nearly eight months before it was to become fully effective. Now the Goldmeiers, with no proof of any adverse employment action ever taken against them by Allstate, incredibly contend that they may recover damages from Allstate based on their speculation that a work-hours policy which never went into effect while the Goldmeiers worked for Allstate ultimately might have impacted their religious practices.

No real issue of statutory interpretation or circuit court divergence exists. Accordingly, this Honorable Court should deny the Goldmeiers' petition for writ of certiorari.

Respectfully submitted,

JON L. FLEISCHAKER
DINSMORE & SHOHL LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202
(502) 540-2300

Counsel of Record for Respondent